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reply to writer

July 16, 2002

Via Electronic Mail and Federal Express

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W. – Portals
Washington, DC 20554

*Re: Reply Comments of the New Jersey Cable Telecommunications
Association in GN Docket No. 00-185 and CS Docket No. 02-52*

Dear Ms. Dortch:

This is submitted on behalf of the New Jersey Cable Telecommunications Association (“NJCTA”) as its reply comments to the comments filed by the New Jersey Board of Public Utilities (“NJBPU”) and the New Jersey Division of Ratepayer Advocate (“NJRPA”) in the above noted matter. The NJCTA is a statewide trade association of cable television operators in New Jersey.

While the NJCTA has not filed original comments in this matter, a number of its member companies, or entities which are parents or affiliates of member companies have filed such comments.¹ The views expressed in those comments are generally consistent with each other and with those of the NJCTA. The purpose of these reply comments is to address the New Jersey specific considerations raised by the NJBPU and the NJRPA.

The NJBPU addresses several specific items of inquiry:

The first: “Should the FCC interpret its assertion of jurisdiction under the Communications Act to preclude state and local authorities from regulating cable modem service and facilities in particular ways?”

The NJBPU responds generally that the New Jersey Cable Television Act (codified at N.J.S.A. 48:5A-1 et seq) contemplates the provision of many more services than “traditional cable television service” (presumably, video programming services) and that the New Jersey Legislature intended that the NJBPU have wide powers over cable

¹ See *Comments of Cablevision Systems Corporation*, filed June 17, 2002; *Comments of Comcast Corporation*, filed June 17, 2002; *Comments of AOL Time Warner Inc.*, filed June 17, 2002; See also *Comments of the National Cable & Telecommunications Association*, filed June 17, 2002.

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television operators. The NJBPU concludes that, given the broad definition of “cable communications service” set out in the New Jersey statute “it is reasonable to conclude that [the New Jersey] Legislature intended the Board to have authority to address issues of services other than cable television reception service provided by cable operators.”

NJCTA agrees with the NJBPU that the New Jersey Legislature in 1972 conceived that “cable television service” would be far more than the provision of video programming services. Indeed, in its Report to the Governor and Legislature² the CATV Study Commission formed to investigate and recommend a state level regulatory scheme for cable television was very prescient. “Any discussion of ‘cable television’ must recognize that the cable technique is adaptable to a great many uses only remotely related to ‘television’ as we know it today. This must be taken into account in framing any regulatory scheme.”³

The *Study Commission Report* cited to the testimony of Dr. William H. Cherry, a physicist and engineer specializing in television engineering: “We think largely of cable television as improving the home entertainment that is received through broadcast television, but that is only the very, very smallest beginning. It will bring to your home education in a vast multitude of forms; home library access and data retrieval; the possibilities of home retail merchandising; pricing and procurement become a wholly new industry opening up in the retail business as cable television becomes a national and continental entity.”⁴

The CATV Study Commission, even with its visionary view of the future of cable television, or, more likely, because of it, recognized that broader interests would be preeminent. The CATV Study Commission held the release of its report for two months waiting for regulatory action at the Federal level, which was then pending. When it finally released its report, it wrote a nine page prefatory letter of explanation, which it included as part of its report and in which it set out developments at the Federal level that influenced its conclusions. It specifically noted, “These Federal developments occurred during the period just preceding the organization and active work of this Commission. As we proceeded, we were at all times aware that the impending FCC regulations could, and probably would, supersede and render unnecessary and invalid State regulation in several important areas.”⁵

As a result of the overarching concern that State regulation in New Jersey not in any way impede Federal regulation, the New Jersey Cable Television Act provides that:

“notwithstanding the foregoing provisions of this section or any of the provisions of this act, it is the intent of this act that all the provisions, regulations and requirements imposed

² *STATE OF NEW JERSEY CATV STUDY COMMISSION REPORT to the Governor and Legislature (Pursuant to Assembly Concurrent Resolution No. 2041 of 1971)*, January 4, 1972 (Released for Publication: March 23, 1972) (“*Study Commission Report*”)

³ *Study Commission Report*, p. 9

⁴ *Id.* p. 48.

⁵ *Id.* p. 1

by or pursuant to this act shall be operative only to the extent that the same are not in conflict with the laws of the United States or with any rules, regulations or orders adopted, issued or promulgated pursuant thereto by any Federal regulatory body having jurisdiction. No requirement, regulation, term, condition, limitation or provision imposed by or pursuant to this act which is contrary to or inconsistent with any such Federal law, regulation or order now or hereafter adopted shall be enforced by the director or shall be authority for the granting, denial, amendment or limitation of any municipal consent or certificate of approval which may be applied for or issued under the terms of this act.”⁶

Under the circumstances, it is fair to conclude that in the enactment of the New Jersey Cable Television Act, the New Jersey Legislature recognized the preeminence of Federal regulation of cable television service, and intended that the New Jersey regulatory scheme be effected consistent with that recognition.

The second bullet: “Should the FCC use its authority to preempt specific state law or local regulation?” The NJBPU responds that because it believes that customers will call the local franchising authority to resolve any complaints “that state law and regulation promulgated thereto can best address service quality issues.”

The fact that some customers may call the local franchising authority, a municipal governing body or the state regulatory agency, in the first instance with any complaint hardly provides the basis for FCC to refrain from preempting local or state law. Indeed, in New Jersey, the Legislature foresaw just that circumstance. It provided: “The board through the office is hereby empowered and directed to cooperate with any Federal regulatory agency in the enforcement within this State of all Federal laws, rules, regulations and orders relating to CATV systems and CATV companies, and therein to act as agent for such Federal regulatory body to the extent authorized by or pursuant to Federal law, and to enter into agreements for said purpose.”⁷

The third bullet asks: “How does the FCC classification of cable modem service as an interstate information service impact rights-of-way and franchising issues?”

The NJBPU responds that “New Jersey is a home rule state.”⁸ The NJBPU admits that conflicts concerning right-of-way regulation issues at the municipal level have caused delay in the franchise renewal process, but nonetheless, concludes that the issue is

⁶ N.J.S.A. 48:5A-10 g. It may be argued that the cited language is a mere admonition to follow Federal law where the same preempts the New Jersey regulatory scheme as a matter of law. That position, however, would render the cited language meaningless. It is axiomatic that all statutory language be given meaning where possible, thus, it is clear that the New Jersey Legislature meant that special deference be made with respect to regulatory matters of multi-jurisdictional import.

⁷ *Id.*, emphasis added.

⁸ The import of that assertion is not apparent. New Jersey is sometimes mistakenly characterized as a “home rule state,” though it is clear that, under New Jersey law, municipalities have only those powers specifically delegated to them by the State, and those reasonably necessary to effectuate those specifically delegated powers. This latter consideration is the basis for the characterization, but those powers are statutory rather than constitutional, and are limited.

best left to “the franchising authorities” as governed by state law, than at the Federal level.

The basis for the NJBPU conclusion is not apparent, however, the history of the occupancy of public right-of-way by cable television, telecommunications, energy and other physical plant is replete with attempts by municipalities to extract exorbitant fees for the use and occupancy of such rights-of-way.⁹ Several New Jersey municipalities, including its major cities, over the last several years, have attempted to, or have adopted local ordinances which have, or will have, created significant barriers to the provision of enhanced cable and telecommunications services.

The next bullet asks: “Does the provision of additional services over the upgraded cable facilities impose additional burdens on the public rights-of-way such that the existing franchising process is inadequate?”

The NJBPU concedes that the only time an additional burden may be imposed on the right-of-way is that if retrofitting the network highway causes substantial construction activity. Given that consideration, and the propensity of local governments to seek to impose fees for the use and occupancy of rights-of-way which exceed actual costs, it is appropriate for the FCC to forcefully articulate that such fees are limited to the actual costs incurred by local governments incidental to such use and occupancy.

In the last bullet, the NJBPU seeks to address the question: “Should the authority conferred on franchising authorities by 632(a) of the Communications Act to establish and enforce customer service requirements apply to cable modem service provided by a cable operator?”

The short answer here is that Section 632(a) does not apply to cable modem service and the NJBPU has provided no legal argument attempting to demonstrate that it does¹⁰.

The NJRPA simply argues in its comments that local franchising authorities should retain jurisdiction to regulate the service quality of cable modem service “because LFAs are in the best position to identify the needs and concerns of customers within their franchise areas.” NJRPA also argues that “with LFAs retaining jurisdiction over cable modem service, consumers would benefit from an efficient and streamlined complaint resolution process that enables the LFA to address concerns more expeditiously.”¹¹

⁹ One asserted basis for such fees has been the argument that since the municipality “owns” the rights-of-way, it should be compensated for the value of the use and occupancy of the right-of-way, over and above the actual burden placed on the municipality to accommodate such use and occupancy. In New Jersey, at least, and, we suspect, in most, if not all, other jurisdictions the public right-of-way is not “owned” by a municipality in the same sense that it might “own” parkland, or the land on which the town hall is located. The law here is quite clear: a municipality holds the land over which a public right-of-way traverses in trust for the use of the public, and may recover only its actual costs incidental to the use and occupancy of such rights-of-way.

¹⁰ See, generally, comments of cable television interests cited at fn 1, *supra*.

¹¹ *NJRPA Comments*, p. 2.

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NJRPA does not address how, as among New Jersey municipalities, county consumer protection agencies, the NJBPU, and its own office, it would divide the receipt of complaints regarding cable modem service, though New Jersey consumers call any or all of such agencies regularly to resolve complaints regarding any number of consumer services. Federal preemption in this area would not add to consumer confusion, at all. If anything, it would identify the one place to call for resolution of such issues.

The difficulty, of course, is that, assuming the Act permitted, leaving the local franchising authorities to develop customer service standards on a locality by locality, or even a state by state basis, would surely result in disparate regulation, and the opportunity to use the development of customer service standards to regulate such services by indirection. NJCTA believes it is clear that all forms of regulation of cable modem service by the states and municipalities is inappropriate under the Act.

As urged by others, the Commission should refrain from imposing new regulations on cable Internet services and should affirmatively preclude state and local governments from imposing any burdensome regulatory constraints, including franchising and fee requirements on such services.

Respectfully submitted,

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